

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

VALVE CORPORATION, a Washington corporation,

Plaintiff,

VS.

SIERRA ENTERTAINMENT, INC. (AKA SIERRA ON LINE, INC.), a Delaware corporation; VIVENDI UNIVERSAL GAMES, INC., a Delaware corporation; and VIVENDI UNIVERSAL, S.A., a French foreign corporation.

Defendants

No. 2:02-cv-01683-TSZ-MAT

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION FOR
PROTECTIVE ORDER**

**NOTE ON MOTION
CALENDAR:
SEPTEMBER 24, 2004**

SIERRA ENTERTAINMENT, INC. (AKA SIERRA ON LINE, INC.), a Delaware corporation; and VIVENDI UNIVERSAL GAMES, INC., a Delaware corporation,

Counter-Claimants,

VS.

VALVE CORPORATION, a Washington corporation; GABE NEWELL and LISA MENNET NEWELL, husband and wife and the marital community composed thereof; and SCOTT LYNCH and JULIE LYNCH, husband and wife and the marital community composed thereof.

Counterclaim Defendants

*Defendants' Reply In Support Of Motion
For Protective Order (2:02-cv-01683-TSZ-MAT)*

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants Sierra Entertainment, Inc. (“Sierra”), Vivendi Universal Games, Inc. (“VUG”) and Vivendi Universal, S.A. move for a protective order for relief from Plaintiff Valve Corporation’s (“Valve’s”) abusive discovery.

ARGUMENT

A. Documents That Do Not Pertain To Valve Products Are Irrelevant To The Claims And Defenses In This Case.

Valve’s primary justification for seeking documents pertaining to non-Valve games is based on an allegation—as yet unalleged in its pleadings—that Sierra/VUG are using Valve games to sell non-Valve titles.¹ Valve’s Opposition To Defendants’ Motion For Protective Order (“Opp.”) at 6–7. More specifically, Valve has claimed in motions—but not in its pleadings—that Sierra/VUG “maintained, and continues to maintain, a scheme for forcing its less popular games on customers who want Valve’s Counterstrike.”² *Id.* at 6. However, documents dealing solely with non-Valve games are irrelevant to this claim and fall outside the proper scope of discovery. Fed. R. Civ. Proc. 26(b)(1) (permitting discovery limited to matters that are “relevant to the claim or defense of any party”).

Sierra/VUG have produced or will soon produce all non-privileged, responsive documents that pertain to non-Valve games to the extent that the documents also contain information regarding Valve or Valve games. Declaration Of Sarah M. King In Support Of Defendants’ Motion For Protective Order (“King Decl.”) ¶4. Valve will therefore receive any

¹Valve claims that the discovery of non-Valve documents will provide “evidence of Vivendi’s differential treatment of the retail channel versus the cybercafé channel, a distinction that is highly relevant to Valve’s claim that Vivendi infringed Valve’s copyright” Opp. at 6 n.4. As discussed in Sierra/VUG’s Opposition to Valve’s Cross-Motion For Partial Summary Judgment Re Cybercafe Rights, documents reflecting internal shorthand references to the words “retail” and “cyber-café” with respect to Valve games cannot trump a carefully-negotiated contract with uniquely defined terms. Even more certainly still, Sierra/VUG’s terminology with respect to *non-Valve* games cannot alter the meaning of the 2001 SPA between Valve and Sierra/VUG.

²Valve attempts to support this wholly unjustified allegation with broad hearsay statements made by Michael Dunkle concerning Sierra/VUG’s purported interactions with cyber-cafés and the reasons for such actions. Sierra/VUG hereby move to strike Mr. Dunkle’s declaration as unsupported by personal knowledge. *See* Fed. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”) Moreover, the email attached as an exhibit to Mr. Dunkle’s declaration (hearsay in and of itself) deals with the requirements imposed by a third party distributor called Pulsar, not Sierra/VUG. Declaration Of H. Michael Dunkle In Support Of Valve’s Opposition To Defendants’ Motion For Protective Order (“Dunkle Decl.”) at 5.

1 documents reflecting sales of Valve titles together with non-Valve titles, any comparison of
 2 Valve and non-Valve prices or any other sort of document that could possibly tend to show a link
 3 between the sale of Valve and non-Valve products. Indeed, all of the examples of the purported
 4 scheme cited by Valve in opposition to this motion mention Valve products by name.

5 The standard for discovery was amended in 2000 in order to curb the type of abusive
 6 discovery that Valve seeks here. The limitation of discovery to “relevant” matter addresses
 7 situations such as this in which a party “seek[s] to justify discovery requests that sweep far
 8 beyond the claims and defenses of the parties.” The rule establishes that parties “have no
 9 entitlement to discovery to develop new claims or defenses that are not already identified in the
 10 pleadings.” 2000 Adv. Comm. Notes to Fed. R. Civ. Proc. 26(b)(1). Valve has already strayed
 11 far beyond the claims in its complaint with its bundling allegations. Moreover, documents which
 12 do not mention Valve products are simply not relevant to Valve’s bundling claim and
 13 Sierra/VUG should not be forced to produce them under the standard set out in the Federal
 14 Rules.

15 **B. Even If Documents Pertaining Solely To Non-Valve Titles Were**
 16 **Relevant, Valve’s Requests Are Overbroad And Unduly Burdensome**

17 **1. Production Of All Documents Pertaining To Blizzard Games**
 Would Require A Massive And Time-Consuming Search For
 Documents Of No Relevance To This Case.

18 As explained in the opening papers, collection of all documents pertaining to the sale of
 19 Blizzard products would require a massive world-wide search for documents similar to the
 20 collection and production of Valve documents currently underway. Defendants’ Motion for
 21 Protective Order (“Mot.”) at 1. Moreover, as explained above, because Sierra/VUG are already
 22 producing all responsive non-privileged documents relating to both Valve and non-Valve
 23 products, Valve will gain nothing from the additional production of non-Valve documents that
 24 have nothing to do with Valve games. Valve’s opposition does not explain why a massive effort
 25 to collect these documents is necessary to prove its case. Rather, Valve argues that
 26 Sierra/VUG’s apparent assets and revenues combined with Valve’s claim for millions of dollars
 27 in damages give it the right to impose a staggering discovery burden. It does not. Valve’s
 28

1 demand for the expenditure of hundreds of thousands of dollars more on discovery because
 2 Sierra/VUG's remote corporate parent Vivendi Universal has deep pockets is undisguised
 3 discovery abuse.

4 **2. Sierra/VUG Should Not Be Forced To Provide Confidential,
 Proprietary and Trade Secret Information From Its Databases
 To Valve's COO Scott Lynch.**

5 Valve offers no justification for requiring that Scott Lynch be included on the list of
 6 persons who may view confidential database information regarding its key competitors.
 7 Sierra/VUG's offer to provide information subject to a modified protective order is reasonable
 8 given the highly sensitive nature of the information. Moreover, Valve itself has acknowledged
 9 that the current Protective Order is insufficient for the parties' most sensitive information, since
 10 Valve itself has asked Sierra/VUG to remove VUG in-house counsel Eric Roeder from the list of
 11 people authorized to view Valve's source code.

12 Valve similarly fails to provide *any* rationale for requiring Sierra/VUG to conduct
 13 database searches for non-Blizzard games or for information predating the 2001 Software
 14 Publishing Agreement ("SPA") upon which the dispute regarding cyber-café sales is based.³ See
 15 King Decl. at 66 (requesting database searches for non-Valve information dating from 1997 to
 16 the present). Sierra/VUG's offer to conduct database searches on Blizzard products from the
 17 period after the second quarter of 2001 meets Valve more than halfway. *Id.* ¶9.⁴

18 **3. Valve's Request For Contracts And "Deal Summary Files" Held
 By Kirstin Wineke Pertaining To All Games Remains
 Unreasonably Broad.**

19 Although Valve initially requested *all* VUG distributor and agreements and related deal
 20 summary files, it has now limited that request somewhat to agreements and deal summary files in
 21 Kirstin Wineke's possession. Opp. at 4. Nevertheless, Valve's request remains unreasonably
 22

23 ³Valve's claims relating to non-Valve products have consistently centered on games produced by Blizzard.
 24 *See, e.g.*, Opp. at 7; Valve's Third Motion to Compel Discovery at 7–9.

25 ⁴Valve also claims that the database searches are "fast and straightforward . . ." and easy to complete. Opp. at
 26 4. In order to run the requested searches for Valve games, Sierra/VUG was required to search four different
 27 databases, including databases that are no longer in use and/or are unsearchable in their current state. Supplemental
 28 Declaration Of Sarah M. King In Support Of Defendants' Motion For Protective Order ("Suppl. King Decl.") at 2–
 11. The burden will be the same to run searches for additional titles.

1 broad, since it encompasses *all* games published by Sierra/VUG, irrespective of date or genre.
 2 *Id.* Valve provides no explanation as to the relevance of these documents other than to say that
 3 the production of such documents would provide an outline of the “potential bundling and other
 4 licensing activity that affected Valve games.” *Id.* However, sales of games prior to the date of
 5 the 2001 SPA *cannot* be relevant, since it is undisputed that Sierra/VUG were entitled to
 6 distribute Valve games to cyber-cafés under the prior SPA. Moreover, Sierra/VUG publish
 7 many titles—including Barbie titles, Hoyle card game titles, and numerous educational and other
 8 titles—that clearly would not be bundled for cyber-café use with Valve games, even if such a
 9 practice were to occur.⁵ Once again, Valve’s request is unnecessarily broad and unduly
 10 burdensome.⁶

11 **C. Michael Tan Was Properly Prepared To Testify Concerning All Of**
 12 **The Topics Designated In Valve’s Rule 30(b)(6) Deposition Notice.**

13 Despite repeated requests by Sierra/VUG, as well as this Court, Valve has yet to
 14 specifically identify *any* questions that Mr. Tan was unable to answer due to a lack of
 15 preparation. Unable to show that Mr. Tan refused to answer questions based on a lack of
 16 knowledge, Valve instead criticizes the method of Mr. Tan’s preparation rather than the results.

17 First, Valve again argues that Mr. Tan lacks personal knowledge of designated topics.
 18 However, Valve has failed to provide any legal authority requiring that a Rule 30(b)(6) witness
 19 have personal knowledge of all topics. Rather, as long as the witness is properly prepared,
 20 “[t]here is no requirement that the deponent have firsthand knowledge and involvement in the
 21 underlying transaction.” 7 Moore’s, *Federal Practice* §30.25[3] (3d ed. 2003);⁷ *see also SEC v.*
22 Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992).

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⁵Sierra/VUG emphatically deny that they engage in the type of bundling alleged by Valve.

⁶Valve blithely characterizes this production as a copy job. Opp. at 4. However, Ms. Wineke testified at her deposition that it would take weeks to copy all of the distributor agreements and deal summary files. Suppl. King Decl. at 12–14.

⁷Valve’s criticism of Sierra/VUG’s use of this citation is unfounded. *See* Opp. at 9 n.5. Sierra/VUG has never disputed that a Rule 30(b)(6) must be appropriately prepared. However, such preparation does not require that the deponent have personal knowledge of all topics.

1 Second, Valve argues that Mr. Tan was unprepared because he failed to contact Hubert
 2 Larenaudie, VUG President for the Asia Pacific Region.⁸ However, as Valve apparently
 3 concedes (*see* Opp. at 11), it would be impractical and beyond the requirements of Rule 30(b)(6)
 4 for a deponent to contact every possible employee with any knowledge of a designated topic.
 5 Rather, a Rule 30(b)(6) deponent is merely required to undertake preparation sufficient to
 6 provide complete and knowledgeable answers. *Media Servs. Group, Inc. v. Lesso, Inc.*, 45 F.
 7 Supp. 2d 1237, 1253 (D. Kan. 1999).

8 Mr. Tan contacted those people involved in the day-to-day interactions and business
 9 operations involving AMDG, as well as the negotiation and administration of the AMDG
 10 contracts. King Decl. at 96–97, 137. Conversely, Mr. Larenaudie is a high-level officer with
 11 minimal knowledge of Sierra/VUG’s day-to-day relationship with AMDG. The appropriateness
 12 of Mr. Tan’s preparation is further demonstrated by the email cited by Valve in its Opposition.
 13 Opp. at 10. Valve argues that the fact that Mr. Larenaudie was carbon-copied on email
 14 correspondence between Quach Quang Dong and AMDG somehow shows that Mr. Tan should
 15 have contacted Mr. Larenaudie. *Id.* However, Valve ignores that Mr. Tan contacted Mr. Quang,
 16 *the author of the email in question*. It is difficult to imagine Mr. Larenaudie possessing
 17 knowledge about such correspondence in excess of that possessed by the author himself.
 18 Consequently, Mr. Tan appropriately contacted and consulted the employees most
 19 knowledgeable about the AMDG contract.

20 **D. Mr. Tan Appropriately Asserted The Attorney-Client And Work
 21 Product Privileges.**

22 Mr. Tan completely and competently answered questions concerning factual information
 23 about Sierra/VUG’s business and its relationship with AMDG, asserting privilege in response
 24 only to improper questions. Designation of an attorney as a Rule 30(b)(6) witness does not result
 25 in a waiver of the attorney-client or attorney work product privileges. Rather, an attorney acting
 26 as a witness for the corporation must answer factual questions, but may assert the attorney-client
 27

28 ⁸Valve inappropriately speculates about Mr. Tan’s motives for not contacting Mr. Larenaudie without
 providing any support for its conjecture. *See id.* at 10.

and/or work product privileges to protect privileged communications. *Sony Elecs, Inc. v. Soundview Techs, Inc.*, 217 F.R.D. 104, 109-10 (D. Conn. 2002).⁹

Valve has not cited any legal authority to the contrary. Rather, Valve selectively quotes from the transcript of the July 30, 2004 telephonic conference before this Court. Contrary to Valve’s insinuation, the Court did not make any ruling on the issue at that time. In fact, the Court recognized that, although designation of an attorney may confuse things, “even a fact witness who’s not a lawyer could say, well, it’s attorney-client privilege. I mean you can’t ask the witness, the fact witness what did you talk to your lawyer about on this subject” Supp. King Decl. at 16-19.

Valve pins its complaint regarding the purportedly improper assertion of privilege on Mr. Tan’s response to *a single question*. Opp. at 12. Valve’s counsel asked Mr. Tan if VUG agreed with AMDG’s statement that “[t]he market activities of AMDG as charged by Valve per Tan’s letter were actually done with your full knowledge and *implied consent . . .*” King Decl. at 133 (emphasis added). Contrary to Valve’s assertion that the question related “merely to [VUG’s] corporate knowledge,” the question improperly called for Mr. Tan to express *legal conclusions* regarding AMDG’s rights under the distributor agreement and whether AMDG acted with VUG’s implied consent. Development of legal conclusions necessarily implicates the creation of protected attorney work product. As such, Mr. Tan was not obligated to answer.¹⁰

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant their Motion For Protective Order.

⁹Valve's citation to *Sony* supports Sierra/VUG's position. The Court in *Sony* held that an attorney acting as a Rule 30(b)(6) witness was only required to answer questions "posed which elicit *purely factual information* . . . and [that] do *not ask for the substance of communications between counsel and client*" 217 F.R.D. at 109–10 (emphasis added). Mr. Tan only refused to answer questions inquiring about the substance of attorney-client communications and/or attorney work product. Moreover, despite the fact that the Rule 30(b)(6) witness in *Sony* refused to answer 47 questions on the basis of privilege, the Court found that the witness properly asserted the attorney-client privilege. *Id.* at 110. The Court only required Sony to produce another witness for unanswered questions "which are not subject to the joint defense or attorney client privilege" *Id.* at 113 (emphasis added).

¹⁰In any event, Valve's question concerning whether Sierra/VUG disagreed with AMDG's statement exceeded the scope of the matters designated in Valve's Deposition Notice. See Mot. at 11 n.9.

1 DATED this 23rd day of September, 2004.
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